Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-01–95 OF 2009
ZALEHA ZAHARI, SULAIMAN DAUD AND JEFFREY TAN JJCA
31 MARCH 2010

Administrative Law — Judicial review — Application for order of mandamus to enforce judgment — Defendant's failure to comply with certificate under s 33 of the Government Proceedings Act 1956 — Whether application time barred — Whether order of mandamus would lie against appellant to enforce payment of judgment sum — Government Proceedings Act 1956 s 33 — Rules of the High Court 1980 O 53 r 3(6) — Specific Relief Act 1950 s 44(2)(b)

On 9 December 2002, Seruan Gemilang Makmur Sdn Bhd ('the respondent') commenced a civil action against the State Government of Pahang ('the first defendant') and the Director of the Forestry Department, Pahang ('the second defendant') for breach of contract. At the end of the trial the High Court entered judgment in favour of the respondent in the sum of RM37,127,471.60 with interest and costs. The defendants appealed against that judgment. In the meantime, the respondent served a sealed copy of the judgment on the counsel for the defendants demanding payment of the judgment sum together with interest and proposed that costs be fixed at RM200,000 in lieu of taxation. When the defendants failed to pay the judgment sum, the respondents applied for a certificate under s 33 ('s 33 certificate') of the Government Proceedings Act 1956 ('the GPA'). On 13 February 2008 the Court of Appeal struck out the defendants' appeal against the judgment and on 17 September 2008, the Federal Court dismissed the defendants' application for leave to the Federal Court against the decision of the Court of Appeal. On 7 March 2008, the senior assistant registrar granted the respondent an order in terms of its application for a s 33 certificate. When service of s 33 certificate was not met with payment the appellant proceeded to file an application for judicial review for an order of mandamus to enforce the said judgment, not against the original defendants in the original suit and named in s 33 certificate, but against the appellant in this appeal. The stated ground for the application for judicial review was failure on the part of the defendants to comply with s 33 certificate. The High Court granted an order in terms and directed the appellant to pay the respondent the sum certified under s 33 certificate within 14 days of the order. The High Court judge held that the order of mandamus could not be issued against the state financial officer by reason of the restriction imposed under s 44(2)(b) of the Specific Relief Act 1950 ('the SRA') but that it could be issued against the appellant

A as the holder of the finance portfolio of the state. The trial judge also found that the appellant had the power to order the payment of the judgment sum out of the consolidated fund of the state by virtue of art 41(1) of the Laws of the Constitution of Pahang ('the state Constitution'). This was the appellant's appeal against that order, which had since been stayed pending B disposal of this appeal. The appellant contended that the application for the order of mandamus was made out of time because it ought to have been made within 40 days from the date of service of the s 33 certificate on the defendants ie 40 days from 7 March 2008. The appellant also contended that he was not the proper party to be issued with such order as he was not the C person responsible for the financial affairs of the state. The appellant had also commenced a new suit against the respondent in the High Court ('the new suit'), wherein it had applied for the judgment obtained by the respondent to be set aside and/or rescinded and for a declaratory order that the respondent's original claim be dismissed. This new suit was still pending before the High D Court. The respondent supported the decision of the trial judge and submitted that the appellant was obliged to pay the state's debt by virtue of his position as the head of administration of the state's debt by virtue of his position as the head of administration of the state. The respondent also argued that it was not in breach of O 53 r 3(6) of the Rules of the High Court E 1980 ('RHC') because the application had been filed within 40 days of the Federal Court's refusal to grant the defendants' leave to appeal. The issues for determination in this appeal were whether the respondent's application was barred by the 40 day limitation set out in O 53 r 3(6) of the RHC and whether the order of mandamus would lie against the appellant to enforce the F payment of the judgment sum.

Held, allowing the appeal with costs:

(1) (per **Zaleha Zahari JCA**) Although it was open for a party to file a fresh suit, subject to certain conditions, cognisance must necessarily be given G to the fact that on the date of hearing of this appeal, the respondent had in hand a judgment obtained after a full trial. As such, the respondent was clearly entitled, in the absence of an order for stay, to enforce the said judgment which had been entered in its favour. The filing of the new suit did not preclude the court from hearing the instant appeal on H its merits (see para 14).

(2) (per **Zaleha Zahari JCA**) The trial judge erred in ruling that the time frame prescribed by O 53 r 6 of the RHC was not rigid. Compliance with the time frame prescribed by the rules was fundamental as it went I to jurisdiction. The rule envisages an easily ascertainable date and imposes an obligation on the decision maker to make a decision and then communicate that decision, which was an integral part of the decision making process. That date when ascertained became final and immune to challenge. As such it became necessary to determine what

on the facts of this case was the date when time started to run for the purpose of ascertaining whether the respondent had acted 'promptly' and within 40 days. In this case it was unclear from the records whether, and when s 33 certificate matter was referred to the appellant for a decision and the decision made, to constitute 'the date when the grounds for the application first arose'. However, on the facts of this case the respondent only resorted to the judicial review application for mandamus to overcome the problem of the defendants' recalcitrance to pay the judgment sum and the respondent only commenced this application after all appeals against the said judgment had been disposed of. Thus, the fact that the application for an order of mandamus was filed within 40 days of the Federal Court decision (17 September 2008) showed that the respondent had acted 'promptly' and in compliance with O 53 r 3(6) of the RHC (see paras 16, 21—22 & 25).

(3) (per **Sulaiman Daud JCA**) Although the order of mandamus could be issued to enforce the performance of a public duty where there had been a failure to perform the same it could not be used as a remedy to compel the exercise of a power by an person or authority. However, the order of mandamus in the instant case was to compel the performance of a duty and not the exercise of a power. As such the question here was not whether the appellant had the power to make or order the making of such payment but whether he had a duty to make such payment. The provisions of the state Constitution and the Financial Procedure Act 1957 did not impose such a duty upon the appellant. The duty to make payment in satisfaction of a judgment debt against the state relates to financial affairs of the state which lies in the hands of the state financial officer. As such the trial judge had erred in law in granting the order of mandamus against the appellant (see paras 40 & 46).

(4) (per **Jeffrey Tan JCA**) The respondent could not levy execution of the judgment by way of the procedure contained in the RHC and the only procedure open to the respondent was that provided in s 33 of the GPA. However, under s 44 of the SRA, the court below had the power to 'make an order requiring any specific act to be done by any person holding a public office'. Since the appellant in the present case was not 'a person holding a public office' an order of mandamus could not be issued against the appellant under s 44 of the SRA. Further, under the state Constitution the appellant was not the principal officer in charge of the financial affairs of the state of Pahang and thus the appellant was not responsible for the payment of the judgment sum (see para 57).

(5) (per **Jeffrey Tan JCA**) Section 33 certificate that was served on the defendants required them to pay the respondent the judgment sum appearing therein together with interest, unless there was a direction

A that payment was to be suspended. Since there was no such direction, the duty to pay arose upon service of s 33 certificate. Thus on the facts of the present case, the grounds for application first arose on 7 April 2008, when service of s 33 certificate was not met with payment, and the application for judicial review filed more than six months later on
B 15 October 2008 without any extension of the said 40 days was filed out of time. There was a patent failure to comply with the rules of court and the order of mandamus should have been refused there and then (see paras 63–64).

C **[Bahasa Malaysia summary**

Pada Disember 2002, Seruan Gemilang Makmur Sdn Bhd ('responden') memulakan tindakan sivil terhadap Kerajaan Negeri Pahang ('defendan pertama') dan Pengarah Jabatan Perhutanan Pahang ('defendan kedua') atas kemungkiran kontrak. Pada akhir perbicaraan, Mahkamah Tinggi
D memasukkan penghakiman bagi pihak responden sejumlah RM37,127,471.60 dengan faedah dan kos. Defendan-defendan merayu terhadap penghakiman tersebut. Sementara itu, responden menyerahkan satu salinan meterai penghakiman itu kepada peguam defendan-defendan menuntut bayaran bagi jumlah penghakiman tersebut bersama faedah dan
E mencadangkan kos ditetapkan pada kadar RM200,000 sebagai ganti taksiran. Apabila defendan-defendan gagal membayar jumlah penghakiman tersebut, responden-responden memohon untuk suatu sijil di bawah s 33 ('sijil s 33') Akta Prosiding Kerajaan 1956 ('APK'). Pada 13 Februari 2008 Mahkamah Rayuan membatalkan rayuan defendan-defendan terhadap penghakiman
F tersebut dan pada 17 September 2008, Mahkamah Persekutuan menolak permohonan defendan-defendan untuk kebenaran merayu ke Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan. Pada 7 Mac 2008, penolong kanan pendaftar memberikan responden satu perintah seperti dipohon bagi permohonannya untuk satu sijil s 33. Apabila penyerahan sijil
G s 33 itu tidak dipatuhi dengan pembayaran, perayu meneruskan untuk memfailkan suatu permohonan untuk semakan kehakiman bagi suatu perintah mandamus untuk melaksanakan penghakiman tersebut, bukan terhadap defendan-defendan asal dalam guaman yang asal dan yang dinamakan dalam sijil s 33 itu, tetapi terhadap perayu dalam rayuan ini.
H Alasan yang dinyatakan dalam permohonan untuk semakan kehakiman adalah kegagalan di pihak defendan-defendan untuk mematuhi sijil s 33 tersebut. Mahkamah Tinggi membenarkan suatu perintah seperti dipohon dan mengarahkan perayu membayar responden jumlah yang diluluskan di bawah sijil s 33 tersebut dalam masa 14 hari dari tarikh perintah tersebut.
I Hakim Mahkamah Tinggi memutuskan bahawa perintah mandamus tersebut tidak boleh dikeluarkan terhadap pegawai kewangan negeri kerana sekatan yang dikenakan di bawah s 44(2)(b) Akta Relief Spesifik 1950 ('ARS') tetapi perintah tersebut boleh dikeluarkan terhadap perayu sebagai pemegang portfolio kewangan negeri. Hakim bicara juga memutuskan bahawa perayu

mempunyai kuasa untuk memerintahkan pembayaran jumlah penghakiman tersebut daripada dana gabungan negeri tersebut berikutan perkara 41(1) Undang-Undang Tubuh Kerajaan Pahang ('Perlembagaan negeri'). Ini merupakan rayuan perayu terhadap perintah tersebut, yang mana telah digantung sementara menunggu penyelesaian rayuan ini. Perayu menghujah bahawa permohonan untuk perintah mandamus dibuat di luar ruang waktu disebabkan ia harus dibuat dalam masa 40 hari dari tarikh penyerahan sijil s 33 tersebut kepada defendan-defendan, iaitu 40 hari dari 7 Mac 2008. Perayu juga berhujah bahawa dia bukanlah pihak yang sepatutnya yang harus diserahkan dengan perintah tersebut kerana dia bukanlah orang yang bertanggungjawab dalam urusan kewangan negeri. Perayu juga memulakan guaman baru terhadap responden di Mahkamah Tinggi ('guaman baru'), di mana, ia memohon agar penghakiman yang diperolehi responden diketepikan dan/atau dibatalkan dan untuk suatu perintah perisytiharan bahawa tuntutan asal responden diketepikan. Guaman baru ini masih lagi belum selesai di Mahkamah Tinggi. Responden menyokong keputusan hakim bicara dan menyatakan bahawa perayu berkewajipan membayar hutang negeri tersebut berikutan jawatannya sebagai ketua pentadbiran negeri tersebut. Responden juga berhujah bahawa ia tidak melanggar A 53 k 3(6) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana permohonan tersebut difailkan dalam masa 40 hari dari tarikh keengganan Mahkamah Tinggi memberikan defendan kebenaran untuk merayu. Isu-isu untuk dipertimbangkan dalam rayuan ini ialah sama ada permohonan responden dihalang oleh tempoh had masa 40 hari yang dinyatakan dalam A 53 k 3(6) KMT dan sama ada perintah mandamus tersebut adalah terhadap perayu untuk melaksanakan pembayaran jumlah penghakiman tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Zaleha Zahari HMR**) Walaupun terbuka kepada suatu pihak untuk memfailkan guaman baru, tertakluk kepada beberapa syarat, perhatian harus diberikan atas fakta bahawa pada tarikh pendengaran rayuan ini, responden telah mendapat penghakiman setelah perbicaraan penuh. Oleh itu, responden dengan jelasnya berhak, dalam ketiadaan perintah untuk penggantungan, untuk melaksanakan penghakiman tersebut yang telah dimasukkan bagi pihaknya. Pemfailan guaman baru tersebut tidak menghalang mahkamah untuk mendengar rayuan ini atas meritnya (lihat perenggan 14).

(2) (oleh **Zaleha Zahari HMR**) Hakim bicara telah khilaf apabila memutuskan bahawa tempoh masa yang ditetapkan oleh A 53 k 6 KMT tidak ketat. Pematuhan terhadap tempoh masa yang ditetapkan oleh aturan-aturan adalah sangat penting kerana melibatkan bidang kuasa. Aturan tersebut menunjukkan tarikh yang mudah dipastikan dan mengenakan suatu tanggungjawab ke atas pembuat keputusan

untuk membuat keputusan dan kemudiannya menyampaikan keputusan tersebut, yang mana merupakan bahagian penting dalam proses membuat keputusan. Tarikh tersebut, apabila dipastikan, menjadi muktamad dan tidak boleh dicabar. Maka, adalah perlu untuk menentukan daripada fakta-fakta dalam kes ini bilakah mulanya tarikh untuk menentukan sama ada responden telah bertindak 'promptly' dan dalam masa 40 hari. Dalam kes ini, adalah tidak jelas daripada rekod-rekod sama ada, dan apabila perkara sijil s 33 tersebut dirujuk kepada perayu untuk keputusan dan keputusan telahpun dibuat, bermaksud 'the date when the grounds for the application first arose'. Walau bagaimanapun, daripada fakta-fakta kes ini, responden hanya menggunakan permohonan semakan kehakiman untuk mandamus untuk mengatasi masalah kedegilan defendan-defendan membayar jumlah penghakiman dan responden hanya memulakan tindakan ini setelah kesemua rayuan terhadap penghakiman tersebut selesai. Oleh itu, fakta bahawa permohonan untuk perintah mandamus difailkan dalam masa 40 hari dari tarikh keputusan Mahkamah Persekutuan (17 September 2008) menunjukkan bahawa responden telah bertindak 'promptly' dan mematuhi A 53 k 3(6) KMT (lihat perenggan 16, 21—22 & 25).

(3) (oleh **Sulaiman Daud HMR**) Walaupun perintah mandamus boleh dikeluarkan untuk melaksanakan kewajipan awam di mana terdapat kegagalan untuk melaksanakannya, perintah tersebut tidak boleh digunakan sebagai remedi untuk memaksa pelaksanaan kuasa oleh seseorang atau pihak berkuasa. Walau bagaimanapun, perintah mandamus dalam kes ini adalah untuk memaksa pelaksanaan kewajipan dan bukannya pelaksanaan kuasa. Oleh itu, persoalannya di sini ialah bukannya sama ada perayu mempunyai kuasa untuk membuat atau memerintahkan pembayaran tersebut tetapi sama ada dia berkewajipan membuat pembayaran tersebut. Peruntukan dalam Perlembagaan negeri dan Akta Prosedur Kewangan 1957 tidak mengenakan kewajipan tersebut ke atas perayu. Kewajipan membuat pembayaran bagi hutang penghakiman negeri adalah berkaitan urusan kewangan negeri yang mana terletak pada pegawai kewangan negeri. Oleh itu, hakim bicara telah khilaf dari segi undang-undang apabila memberikan perintah mandamus terhadap perayu (lihat perenggan 40 & 46).

(4) (oleh **Jeffrey Tan HMR**) Responden tidak boleh mengenakan pelaksanaan penghakiman tersebut mengikut prosedur yang terdapat dalam KMT dan satu-satunya prosedur yang boleh digunakan oleh responden ialah apa yang diperuntukkan dalam s 33 APK. Tetapi, di bawah s 44 ARS, Mahkamah Tinggi mempunyai kuasa untuk 'make an order requiring any specific act to be done by any person holding a public office'. Memandangkan perayu dalam kes ini bukannya 'a person holding a public office' suatu perintah mandamus tidak boleh

dikeluarkan terhadap perayu di bawah s 44 ARS. Selanjutnya, di bawah Perlembagaan negeri, perayu bukanlah pegawai utama yang bertanggungjawab atas urusan kewangan negeri Pahang dan oleh itu perayu tidak bertanggungjawab bagi pembayaran jumlah penghakiman tersebut (lihat perenggan 57).

(5) (oleh **Jeffrey Tan HMR**) Sijil s 33 yang diserahkan kepada defendan-defendan memerlukan mereka membayar responden jumlah penghakiman yang tertera di dalamnya bersama faedah, kecuali terdapat arahan bahawa bayaran harus dihentikan buat sementara. Memandangkan tiada arahan sedemikian, tugas untuk membayar berbangkit berikutan penyerahan sijil s 33 tersebut. Oleh itu, atas fakta-fakta kes ini, alasan-alasan untuk permohonan tersebut mula-mula dibangkitkan pada 7 April 2008, apabila penyerahan sijil s 33 tidak dituruti dengan pembayaran, dan permohonan untuk semakan kehakiman difailkan lebih dari enam bulan iaitu 15 Oktober 2008 tanpa sebarang lanjutan masa 40 hari tersebut difailkan diluar masa yang ditetapkan. Terdapat kegagalan yang jelas untuk mematuhi aturan-aturan mahkamah dan perintah mandamus harus ditolak serta-merta (lihat perenggan 63–64).]

Notes

For cases on judicial review generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 190–218.

Cases referred to

Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 MLJ 704, CA (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 5 MLJ 773, CA (refd)

Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors [1999] 2 MLJ 385, HC (refd)

Bursa Malaysia Securities Bhd v Gan Boon Aun [2009] 4 MLJ 695, CA (refd)

Cheah Wow Nyan and Cheah Sin Kee v Kalrm. Palaniappa; Cheah Lean Guan; Official Assignee of the Property of Cheah Lean Guan a Bankrupt [1935] MLJ 31, HC (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor [1983] 2 MLJ 54, FC (refd)

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641; [2008] 5 CLJ 321, FC (folld)

TR Lampoh Ak Dana & Ors v Government of Sarawak [2005] 6 MLJ 371, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25, Schedule para 1
Federal Constitution arts 132(1), (3), 160
Financial Procedure Act 1957 s 6(2)
Government Proceedings Act 1956 ss 33, 33(1), (3), (4), 44
Interpretation Acts 1948 and 1967
Laws of the Constitution of Pahang arts 11, 11(1), (4), 41, 41(1), 45(1), (2), Chapter V
Laws of the Constitution of Sabah arts 6(1), (2), 9(1)
Rules of the High Court 1980 O 45, O 46, O 47, O 48, O 49, O 50, O 51, O 52, O 53 rr 1, 1(1), 1A, 3(6), O 73 r 12
Specific Relief Act 1950 s 44, 44(1), (2)(b)

Appeal from: Application for Judicial Review No 25–9 of 2008 (High Court, Kuantan)

Mohamad Shafee Abdullah (Mat Za'raai bin Alias, S Siva and Peter Skelchy with him) (State Legal Advisor, Pahang) for the appellant.
Karpal Singh (Rajoo D Moorthy, Amardas and Jimmy Ng with him) (Peter Lai, Rajoo & Aiza) for the respondent.

Zaleha Zahari JCA:

[1] I have had the advantage of seeing the judgment of my brothers, Sulaiman Daud JCA and Jeffrey Tan Kok Wha JCA on the issues raised in argument in this appeal. With respect, I take a different position on the issue whether the application for judicial review for an order of mandamus by Seruan Gemilang Makmur Sdn Bhd, the applicant in the High Court and respondent in this appeal ('the respondent') was in breach of the time frame prescribed in O 53 r 3(6) of the Rules of the High Court 1980 ('the Rules'). On the issue whether the respondent was right in citing the Menteri Besar Negeri Pahang Darul Makmur (appellant in this appeal) as the respondent to their application, I would like to give my supporting views.

BACKGROUND

[2] The undisputed facts disclosed in the statement and affidavits filed in support and in opposition to the application filed by the respondent are these.

[3] On 9 Disember 2002 the respondent filed Kuantan Civil Suit No MT(2)–21–9 of 2002 ('the original suit') citing the State Government of Pahang as the first defendant and the Director of the Forestry Department, Pahang as the second defendant ('the defendants') for breach of contract. At

the end of trial on 25 May 2007, the High Court entered judgment in favour of the plaintiff (ie the respondent in this appeal) in the sum of RM37,127,471.60 with interest at the rate of 8%pa from 31 December 2000 ('the said judgment') to date of settlement. The defendants filed an appeal on 1 June 2007 against the said judgment to the Court of Appeal.

[4] Vide their solicitors letter dated 27 August 2007, the respondent served a sealed copy of the said judgment on the Pahang State Legal Adviser (counsel for the defendants in the original suit) demanding payment of the judgment sum together with interest within seven days and proposed that costs be fixed at RM200,000 in lieu of taxation. The defendants failed to pay the judgment sum within the period specified in this letter.

[5] Pending disposal of the defendants' appeal against the said judgment in the Court of Appeal, the respondent vide summons in chambers dated 24 September 2007 in the original suit applied for a certificate under s 33 of the Government Proceedings Act 1956 ('the Act'). The senior assistant registrar ('SAR') granted an order in terms of this application on 7 March 2008. The material part of this order states as follows:

> ADALAH PADA HARI INI DIPERINTAHKAN bahawa suatu Sijil dikeluarkan kepada Plaintif dalam tindakan ini menurut Seksyen 33 Akta Prosiding Kerajaan 1956 bagi pembayaran amaun penghakiman berjumlah RM37,127,471.60 dengan faedah ke atasnya pada kadar 8% setahun mulai 31.12.2000 hingga penjelasan menurut penghakiman yang diberikan oleh Mahkamah yang mulia ini dalam tindakan ini pada 25hb Mei 2007 terhadap Defendan Pertama, Kerajaan Negeri Pahang Darul Makmur dan Defendan Kedua, Pengarah Negeri Pahang Darul.

[6] The s 33 certificate states as follows:

> DALAM MAHKAMAH TINGGI MALAYA DI KUANTAN
>
> DALAM NEGERI PAHANG DARUL MAKMUR
>
> GUAMAN NO. MT(1)21 – 9 TAHUN 2002
>
> Antara
>
> 1. SERUAN GEMILANG MAKMUR SDN. BHD... PLAINTIF
>
> 2. PENGARAH PERHUTANAN NEGERI PAHANG DARUL MAKMUR ... DEFENDAN-DEFENDAN
>
> PERAKUAN PERINTAH UNTUK AMAUN
>
> PENGHAKIMAN TERHADAP KERAJAAN
>
> Mengikut Penghakiman Mahkamah ini bertarikh 25hb Mei 2007 telah. dihakimkan bahawa Defendan-Defendan hendaklah membayar kepada Plaintif RM137,127,471.60 dengan faedah ke atasnya pada kadar 8% setahun mulai 31hb Disember 2000 hingga penjelasan.

Saya dengan ini memperakukan bahawa amaun penghakiman yang kena dibayar kepada Plaintif menurut Penghakiman tersebut ialah RM37,127,471.60 dan faedah adalah kena dibayar atasnya pada kadar 8% setahun dari 31hb Disembor 2000 sehingga pembayaran

Bertarikh pada 7hb Mac 2008

t.t.

NOOR AISAH BINTI MOHMED

Penolong Kanan Pendaftar,

Mahkamah Tinggi

[7] This s 33 certificate issued pursuant to order dated 7 March 2008 is the foundation of the respondent's application for judicial review for an order of mandamus, the subject matter of this appeal.

[8] The Court of Appeal struck out the defendants' appeal against the said judgment on 13 February 2008 for failure to file their record of appeal within time. An application for leave to appeal to the Federal Court was then filed by the defendants against this decision of the Court of Appeal.

[9] About three weeks after the Court of Appeal decision, ie on 7 April 2008, the respondent's solicitors served on the Pahang State Legal Adviser a copy of the SAR's order dated 7 March 2008 as well as the s 33 certificate. The defendants again did not make any payment of the judgment sum. They also did not take any step to obtain an order for stay of the said judgment. The situation remained at status quo for another period of about five months.

[10] On 17 September 2008, the Federal Court dismissed the defendants' application for leave to appeal to the Federal Court against the Court of Appeal decision dated 13 February 2008.

[11] On 15 October 2008, (ie slightly over a month after the Federal Court decision) the respondent filed an application for judicial review for an order of mandamus to enforce the said judgment, not against the defendants in the original suit and named in the s 33 certificate, but against the appellant in this appeal.

[12] The High Court on 3 November 2008 entertained an oral application to amend the application filed to one for leave to apply for an order of mandamus and granted an order in terms of the orally amended application. On the substantive application filed on 8 November 2008, the High Court granted an order in terms of the application on 20 April 2009. The appellant was directed to pay the respondent the sum certified under the s 33 certificate

within 14 days of the said order. This order of the High Court has since been stayed pending disposal of this appeal.

[13] In presenting the appellant's case, Dato' Shafee Abdullah, at the outset of hearing, highlighted the fact that the defendants in the original suit had, on 22 December 2008, filed a new suit, ie Kuantan High Court Civil Suit No 21–11 of 2008 ('the new suit') against the plaintiff in the original suit (ie the respondent in this appeal) for the following reliefs: (a) that the judgment of the High Court in the original suit dated 25 May 2007 be set aside and/or rescinded; a declaratory order that the plaintiff's claim in the original suit be dismissed. Alternatively, for an order that a fresh trial be commenced in respect of the original suit. Further, that all proceedings undertaken by the plaintiff in the original suit to enforce order dated 25 May 2007 (the order which the respondent was seeking to enforce and the subject matter of this appeal) be declared a nullity. There was also a claim for damages, aggravated and/or exemplary, as well as for consequential orders. The new suit is pending before the High Court on the date of hearing of this appeal.

[14] My views on this development are these. True, it is open for a party to file a fresh suit if a judgment or order has been obtained by fraud, or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, (see *Cheah Wow Nyan and Cheah Sin Kee v Kalrm. Palaniappa; Cheah Lean Guan; Official Assignee of the Property of Cheah Lean Guan a Bankrupt* [1935] MLJ 31; *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (FC)). Be that as it may cognisance must necessarily be given to the fact that on the date of hearing of this appeal, the respondent had in hand a judgment obtained after a full trial, that had been subjected to an appeal, which appeal was struck out by the Court of Appeal. Thereafter, leave to appeal was refused by the Federal Court. In such a situation, the said judgment for all intents and purposes, is a valid judgment. In the absence of an order for stay, the respondent was clearly entitled to enforce the said judgment which had been entered in their favour. The fact of the filing of the new suit per se, in my considered opinion, does not preclude this court from proceeding to hear this appeal on its merits.

[15] On the issues raised on the merits of this appeal my views are these. It is abundantly clear that the respondent has an unsatisfied judgment against the defendants in the original suit. To pursue the said judgment to satisfaction it was incumbent upon the respondent to comply with O 53 r 3(6) of the Rules which provides as follows:

> An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the respondent provided that the court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[16] The High Court in its judgment was of the view that the 40 days specified under O 53 r 3(6) was not rigid. I am of the view the judge erred in ruling that the time frame prescribed by the rules is not rigid. I am in agreement with the appellant's counsel that compliance with the time frame prescribed by the rules is fundamental as it goes to jurisdiction (see *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54).

[17] The question for determination in this appeal is, against what date is the very ordinary word 'promptly' to be considered on the facts of this case? What is the commencement date when the 40 days prescribed by the rules is to be computed?

[18] The appellant's counsel submitted that the respondent had not acted 'promptly', that there was delay in filing the application for judicial review as it was not filed within 40 days as prescribed by the Rules. The appellant's counsel computed time from 7 April 2008, ie the date of service of the s 33 certificate on the Pahang State Legal Adviser. The last day for filing of the application was, according to him, 17 May 2008. As the application for judicial review was filed on 15 October 2008, it was therefore about five months out of time. The fact that the respondent did not apply for an extension of time for leave to apply, and the failure to give an explanation for delay was highlighted. He pointed out that in Mersing Omnibus, where the appellant was out of time and had not sought an extension of time nor accounted for the delay, the Federal Court held that leave should not have been granted.

[19] On the other hand the respondent's counsel argued that they were not in breach of O 53 r 3(6). The respondent had acted 'promptly' by reason of the application having been filed within forty days of the Federal Court's refusal to grant the defendants' leave to appeal (17 September 2008). He further submitted there was a continuing breach by reason of the continued failure to pay the judgment sum.

[20] My brother, Jeffrey Tan JCA, in his draft judgment, took the view that the respondent's application was filed out of time, which view my brother, Sulaiman Daud JCA has expressed his agreement. With respect, I take a different position for the following reasons.

[21] The word 'and', between the word 'promptly' and the words 'in any event within 40 days' in its plain and ordinary meaning clearly is not disjunctive but conjunctive. An aggrieved person is required to act 'promptly', and in any event, not later than forty days from 'the date when the grounds for the application first arose' or 'when the decision is first communicated to

the respondent'. The rule envisages an easily ascertainable date. It imposes an obligation on the decision maker to make a decision, and to then communicate the decision. This is an integral part of the decision making process. That date when ascertained, and upon expiration of the prescribed time frame, such a decision then becomes 'final' and immune to challenge. The intention of the rules clearly is that it is in the public interest that an aggrieved person's right of access to the court has to yield to the need for a swift finality of decision.

[22] What then is the date when time starts to run for the purpose of ascertaining whether the respondent had acted 'promptly' and within 40 days on the facts of this case? The date suggested by the appellant's counsel is the date of service of the SAR's order and the s 33 certificate on the Pahang State Legal Adviser, counsel for the defendants (7 April 2008). Is this date 'the date when the grounds for the application first arose'? Alternatively, is this the date 'when the decision is first communicated to the respondent'.

[23] I am of the view that the suggested date '7.4.2008', certainly is not 'the date when the grounds for the application first arose' for these reasons. The respondent has chosen to name the appellant as the respondent to the application for judicial review. It is unclear from the record whether, and when, the s 33 certificate matter was referred to the appellant for a 'decision' and the decision made, to constitute 'the date when the grounds for the application first arose'. Logically, the date of the decision would be a date subsequent to the date of service of the s 33 certificate on the state legal adviser. This would have a bearing on the next issue which would be considered later on in this judgment.

[24] Next, on the assumption that the s 33 certificate was referred to the appellant for a decision, and the appellant's decision was not to comply with the s 33 certificate, the rules require him to communicate that decision, and when communicated, that would then be the date 'when the decision is first communicated to the respondent'. What transpired after service of the court order dated 7 April 2008 and the s 33 certificate on the Pahang State Legal Adviser and the appellant is not within the knowledge of the respondent, but within the knowledge of the appellant. Whether this non-disclosure was deliberate or inadvertently omitted, is unclear. In the absence of a date implicating the appellant being held out, I am constrained to search for a more just result. I take the position when conferring a right of access to the courts, if indeed the matter was referred to the appellant and a decision had in fact been made by him, that right cannot be lost before the respondent is notified of that decision and having the opportunity of feeling 'aggrieved'.

[25] On the facts of this case it is clear that the respondent only commenced enforcement proceedings by way of an application for judicial review after all appeals against the said judgment had been disposed of. The judicial review application for mandamus resorted to by the respondent was to overcome the problem when confronted with the recalcitrance of the defendants in the original suit to pay the said judgment. Clearly, in the present circumstances the fact that the respondent took such an action after all appeals had been disposed of should not be held against them. I am in agreement with the respondent's counsel that the filing of the application for judicial review for an order of mandamus within 40 days of the Federal Court decision (17 September 2008) that the respondent had acted 'promptly' and in compliance with O 53 r 3(6) of the Rules.

WHETHER THE APPELLANT A PROPER PARTY TO THE APPLICATION

[26] I accept the proposition that a s 33 certificate imposed a statutory obligation on a state Government to do their duty to make payment. The Federal Court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321 expressed the following view:

> … there is a duty on the part of the government to pay the amount stated in the certificate issued under s 33(3) of the GPA to the respondent. It is not a matter of discretion for the government whether to pay or not to pay. As a statutory duty it is of course binding on the state government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of mandamus.

[27] It is however incumbent upon the respondent to cite the proper party in pursuit of their judgment to satisfaction. The respondent's decision to cite the appellant, and not the state financial officer of Pahang, as respondent to the application appears to be a considered one by reason of the state financial officer being a member of one the 'public services' and on account of their reading of the Federal Court decision in *Petrojasa*. The respondent took the position that the appellant was the right person to be named as he is the Chief Executive of the State of Pahang, in charge of the finance portfolio of the State of Pahang and the competent authority to make payment from the state consolidated fund. Accordingly, the responsibility to make payment of the said judgment was under the appellant's supervision.

[28] The appellant's counsel submitted that the appellant had been wrongly cited as party to the application as he is not the officer responsible for the financial affairs of the State of Pahang. The appellant's reading of the Federal Court decision in *Petrojasa* was that there was no impediment for a

state financial officer of a state to be named as a respondent to a judicial review proceeding for enforcement of a judgment against the state.

[29] Articles 11 and 41 of the Laws of the Constitution of Pahang states as follows:

> 11 Appointment of the State Secretary, the State Legal Adviser and the State Financial Officer
>
> (1) There shall be constituted the offices of State Secretary, State Legal Adviser and State Financial Officer, and the appointments thereto shall be made by the appropriate Service Commission from amongst members of any of the relevant public services. …
>
> (4) The State Financial Officer shall, subject to the provisions of this Part, be the principal officer in charge of the financial affairs of the State.
>
> 41 Expenditure charged on Consolidated Fund
>
> (1) There shall be charged on the Consolidated Fund of the State, in addition to any grant, remuneration or other moneys so charged by any other provision of the Constitution of the State or by State law
>
> (a) the Civil List of the Ruler and the remuneration of the Speaker of the Legislative Assembly;
>
> (b) all debt charges for which the State is liable; an any moneys required to satisfy any judgment, decision or award against the State by any court or tribunal.

[30] I am in agreement with the appellant's counsel that under the Pahang State Constitution the responsibility for the financial affairs of the State of Pahang is conferred on the state financial officer and the respondent's reliance on *Petrojasa* as authority for the proposition that the state financial officer cannot be cited as a party to enforce a judgment against a state government was misplaced. There is no such legal impediment. It is to be noted that in *Petrojasa* the 'Minister of Finance, Government of Sabah', not the 'Chief Minister, Government of Sabah' was cited as party based on arts 6(1) and (2) and 9(1) of the Laws of the Constitution of Sabah.

[31] The learned judge should have dismissed the application as the proper party had not been cited in the judicial review application. On this ground, I am in agreement with the conclusion of my brothers to allow this appeal with costs.

Sulaiman Daud JCA:

[32] There were two issues raised in this appeal which have been

elaborately argued before us. The first concerns the time when the 40 days limitation set out in O 53 r 3(6) of the Rules of the High Court 1980 ('the RHC') begins to run in the present case. The second is whether the order of mandamus would lie against the appellant to enforce the payment of the judgment sum against the State Government of Pahang by virtue of a certificate issued under s 33(1) ('the s 33 certificate') of the Government Proceedings Act 1956 ('the GPA'). The learned trial judge found for the respondent on both the said issues. It was held that the present application was not barred by the said 40 days limitation, and that the order of mandamus would lie against the appellant to enforce the payment of the judgment sum.

[33] We heard the appeal on 5 October 2009 and after hearing submissions of counsel for both parties, we unanimously allowed the appeal with costs. I have had the advantage of reading in draft the judgment of my learned friend Jeffrey Tan JCA. I generally agree with his reasons and conclusion and wish to add some observations with regard to second issue.

[34] From the grounds of judgment, it appears to me that the learned trial judge had allowed respondent's application herein on three main grounds. First, he held that the order of mandamus could not be issued against the state financial officer, being the principal officer in charge of financial affairs of the state, by reason of the restriction imposed under s 44(2)(b) of the Specific Relief Act 1950 ('the SRA'). Secondly, he found that the order of mandamus could be issued against the appellant by virtue of his position as the chairman of the state executive council and the holder of the finance portfolio of the state. Thirdly, he also found that the respondent has the power and competence to order the payment of the judgment sum out of the consolidated fund of the state ('the consolidated fund') by virtue of art 41(1) of the Laws of The Constitution of Pahang ('the state Constitution').

[35] Learned counsel for the appellant submitted that the order of mandamus should not be issued against the appellant to comply with the s 33 certificate in respect of the judgment sum payable by the state government to the respondent. It was contended that the appellant was not the proper party to be issued with such an order as he was not the person responsible for the financial affairs of the state. He pointed out it is expressly provided under the state Constitution that the state financial officer is the principal officer in charge of financial affairs of the state. Further, learned counsel submitted that s 44(2)(b) of the SRA does not expressly prohibit the making of an order against a government servant to enforce the satisfaction of a claim upon the government, and that the court is still empowered to make such an order by virtue of the additional power conferred by para 1 of the Schedule to the Courts of Judicature Act 1964. In support of this proposition, learned

counsel relied on the decision of the Federal Court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641, where it was held that an order of mandamus would lie against the Minister in charge of financial matters of the State of Sabah for the payment of the judgment sum under the s 33 certificate.

[36] Learned counsel for the respondent supported the decision of the learned trial judge. He submitted that the appellant is obliged to pay the state's debt by virtue of his position as the head of administration of the state who also holds the portfolio of finance. Learned counsel further submitted that the state financial officer is a member of the public service, and by virtue of the prohibition imposed under s 44(2)(b) of the SRA no order can be made against him to enforce the satisfaction of the said judgment sum.

[37] In William Wade's *Administrative Law*, Clarendon Press, Oxford (7th Ed), the learned author said, at pp 643 and 644:

> The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds … The commonest employment of mandamus is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty to him.

Further down at p 644, it is stated:

> Disobedience to mandamus is a contempt of court, punishable by fine or imprisonment. A mandamus is therefore very like a mandatory injunction: both are commands from the court that some legal duty be performed. But the two remedies have different spheres. The injunction is an equitable remedy, and it is rare to find mandatory injunctions outside private law. Mandamus is a common law remedy, based on royal authority, which is used only in public law.

[38] In MP Jain's *Administrative Law of Malaysia and Singapore* (2nd Ed, 1980) the learned author said, at pp 449 and 450:

> … Mandamus can be granted only when a legal duty is imposed on an authority and the applicant has a legal right to compel the performance of the public duty prescribed by law, and to keep the subordinate bodies and officers exercising public functions within the limit of their jurisdiction. Mandamus is thus a very wide remedy which is available against a public officer to see that he does his duty.
>
> What can be enforced through mandamus is a duty of a public nature the performance of which is imperative and not optional or discretionary with the concerned authority. Thus, if an officer has a power rather than a duty, and he does not use his power, mandamus cannot be issued.

[39] Section 44(1) of the SRA also empowers the court to make an order in the nature of mandamus against any person holding public office requiring him to do certain specific acts subject to the fulfillment of the five provisos set out therein (see MP Jain's *Administrative Law of Malaysia and Singapore*, at p 452). However it expressly provided in sub-s (2)(b) thereof that nothing in that section 'shall be deemed to authorize a Judge to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government'.

[40] It is clear from the aforesaid passages that the order of mandamus could be issued to enforce the performance of a public duty where there has been a failure to perform the same. However it cannot be used as a remedy to compel the exercise of a power by any person or authority. In the present case, the question as to whether there is a duty on the part of the appellant to pay the judgment sum pursuant to the s 33 certificate could, in my view, be answered by reference to the provisions of the state Constitution and the laws relating to financial matters for the time being force in the state.

[41] Under the state Constitution the executive power of the state is vested in the Ruler but executive functions may by law be conferred on other persons or authorities. The Ruler shall appoint an executive council to advice him in the exercise of his functions under the Constitution. The executive council comprises the Menteri Besar and such other members not exceeding ten as may be appointed by the Ruler.

[42] In addition, the state Constitution also provides for the appointment of the state Secretary, the state legal adviser and the state financial officer from amongst members of the relevant public services as the ex-officio members of the executive council. Article 11(1) of the state Constitution specifically provides that the state financial officer to be the principal officer in charge of financial affairs of the state.

[43] Chapter V of the state Constitution deals with financial matter. Article 41(1)(c) specifically provides that any moneys required to satisfy any judgment shall be charged to the consolidated fund. Article 45(1) permits moneys charged on the consolidated fund to be withdrawn from the Fund, while art 45(2) prohibits the withdrawal of such moneys except in the manner provided by federal law.

[44] The control and management of the public finance of Malaysia, including the custody and payment of the public moneys of the state is governed by the Financial Procedure Act 1957 ('the FPA'). Section 6(2) of the FPA provides that the management of the consolidated fund of a state and the supervision, control and direction of all matters relating to the financial

affairs of the state not specifically assigned to any other person shall, subject to the Federal Constitution, the Constitution of the state and the Act, vest in the state financial authority. In relation to the consolidated fund of the state, the words 'financial authority' is defined as the principle officer in charge of the financial affairs of the state which in the present case is the state financial officer.

[45] It is not disputed that the appellant is the chairman of the executive council, being the body responsible to advice the Ruler in the exercise of his executive power of the state. It is also not disputed that the real decision-making power of the state rests with the executive council which is headed by the appellant. In his capacity as the Menteri Besar he may have some duty or function to perform either in the capacity of his office or as a member of the executive council. At the same time there are other government officers under various government departments which also perform specific acts of the government whether administratively or as required by law.

[46] In the present case the effect of the order against the appellant is to compel him to make the payment of the judgment sum pursuant to the s 33 certificate. It is clear from the passages referred to above that the order of mandamus is to compel the performance of a duty and not the exercise of a power. As such the question here is not whether the appellant has the power to make or order the making of such payment but rather whether he has a duty or obligation to make such payment. Upon perusal of the provisions of the state Constitution and the FPA, I find nothing therein that imposes such a duty or an obligation upon the appellant. The duty to make payment in satisfaction of a judgment debt against the state relates to financial affairs of the state which lies in the hands of the state financial officer. As such, I am of the view that the learned trial judge has erred in law in granting the order of mandamus against the appellant to compel him to pay the said judgment sum pursuant to the s 33 certificate.

[47] However, I find it unnecessary to consider the issue as to whether or not s 44(2)(b) of the SRA prohibits the issuance of mandamus against the state financial officer as raised by learned counsel in the course of their submission as it is not relevant for the determination of this appeal.

[48] For all the reasons aforesaid, I would allow the appeal with costs.

Jeffrey Tan JCA:

[49] For the purposes of this appeal, it is not inapposite to say that for all intents and purposes, the respondent has a valid monetary judgment (the

receipt of RM37,127,471.60 together with interest thereon at the rate of 8%pa from 31 December 2000 to date of satisfaction) against the State Government of Pahang and the Director of the Forestry Department of Pahang (hereinafter jointly called the defendants), notwithstanding the fact that the respondent has filed a concurrent but as yet unconcluded action to set aside the judgment. That monetary judgment was obtained by the respondent on 25 May 2007 vide Kuantan High Court Civil Suit 21–9 of 2002 after a full trial. Appeal against that judgment was struck off by the Court of Appeal on 13 February 2008. The application for leave to further appeal was dismissed by the Federal Court on 17 September 2008.

[50] But even before all avenues of appeal had closed, the respondent had proceeded to levy execution of the judgment. On 7 March 2008, the respondent had obtained a certificate under s 33(1) of the Government Proceedings Act 1956 ('GPA'), and on 7 April 2008, the respondent had served that s 33(1) certificate on the State Legal Advisor of Pahang. The next action that the respondent took to compel payment of the judgment sum was to issue a letter of demand on 27 August 2008, which drew no response from the defendants. The respondent then applied, on 15 October 2008, for leave to issue an order of mandamus directing payment of the judgment sum by the appellant, not by the defendants. That leave was granted on 3 November 2008. The order of mandamus that followed was issued on 20 April 2009, which order is now the subject of this appeal.

[51] Only two issues were raised in submission before us, which were, now abridged, the following. Dato' Muhammad Shafee Abdullah for the appellant contended that the application for the order of mandamus must be made within 40 days from the date of service of the s 33(1) certificate, that the application for the order of mandamus was made out of time, and that the order of mandamus was issued to the wrong entity. Mr Karpal Singh for the respondent submitted that the said 40 days time period did not apply, that under s 44 of the GPA the state financial officer could not be sued, and that the appellant was the head of the state government. Mr Amardass who appeared with Mr Karpal added that the appellant was in charge of the finance of the state. Dato' Muhammad Abdullah Shafee replied that the respondent could proceed against the state financial officer, who was the pertinent public officer.

[52] No issue was raised that an order of mandamus per se could not issue against the appellant. But whether mandamus could issue against servants and or agents of the state was the sole issue in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641, where the respondent had obtained a monetary judgment against the State Government of Sabah and had taken out judicial review proceedings against the Minister of Finance,

Government of Sabah to compel payment of the judgment sum as certified in a similar s 33(1) certificate. That s 33(1) certificate was served on the State Government of Sabah. The required payment was not made. Leave was then granted to the respondent to apply for an order of mandamus. But the substantive application for the order of mandamus was dismissed by the High Court who held that the application under s 33(3) of the GPA was prohibited by s 33(4) of the GPA. On appeal, the Court of Appeal was of the view that s 33(4) of the GPA, s 44(1) of the Specific Relief Act 1950 ('SRA') and O 73 r 12 of the Rules of the High Court 1980 ('RHC') were no impediments to the application. On further appeal, the sole issue before the Federal Court was whether judicial proceedings could be taken against the said Minister to compel payment of the judgment sum as certified in the said s 33(1) certificate.

[53] The facts in *Petrojasa* bear comparison to the facts of the instant appeal, but the rulings in *Petrojasa* bear upon the instant appeal, for those rulings from the apex court apply to all proceedings to compel compliance of any order (including an order for costs) made by any court in favour of any person against the government or against an officer of the government. In answering the question as to whether mandamus lie, the Federal Court per Abdul Hamid Mohamad CJ held (i) that as against a government, there can be no resort to any of the procedures provided by O 45–O 52 of the RHC (para 11 of the report) (ii) that as against a government, the only procedure allowed is as provided by s 33 of the GPA (para 11 of the report), (iii) that under s 44 of the SRA, a judge 'may make an order requiring any specific act to be done 'by any person holding a public office' but not 'to make an order on any servant of any Government in Malaysia' or 'to make any order which is otherwise expressly excluded by any law for the time being in force' (para 13 of the report) 649), (iv) that the Government of Malaysia is not a person holding a public office (para 16 of the report), (v) that a 'public office' and 'public officer' are defined in the Interpretation Act 1948 and 1967 and read together with art 132(1) of the Federal Constitution (paras 20–21 of the report) (vi) that the said Minister was a member of the administration as defined in art 160 of the Federal Constitution and was not a person holding public office (paras 23–24 of the report), (vii) that s 44 of the SRA was not applicable to the said Minister and an order therefore under s 44 of the SRA could not be issued against him (para 24 of the report), (viii) that under s 25s of the Courts of Judicature Act 1964 ('CJA'), the court has the additional powers set out in the schedule to the CJA, and which powers 'are not subject to or limited to what are provided by the GPA or SRA' (paras 30 of the report), and, (ix) that mandamus laid against the said Minister (paras 31 and 37 of the report).

[54] Ariffin Zakaria FCJ, as he then was, similarly held (i) that by reason of O 73 r 12(1) of the RHC, the ordinary method of execution as contained in O 45–O 52 of the RHC lie not against a government (paras 54 and 59 of the report), (ii) that s 25 of the CJA are additional powers to that already seized by a court (para 67 of the report), and, (iii) that 'resort may … be had to paragraphs in the Schedule to found jurisdiction to grant relief not expressly prohibited by written law' (para 67 of the report).

[55] And in relation to the legal effect of the said s 33(1) certificate, Ariffin Zakaria FCJ further enunciated (iv) that 'the GPA is not to enable the state government to flout the law but to provide a special procedure in order to avoid the embarrassment of execution proceedings against the state government' (para 71 of the report), (v) that the word 'shall' in the context of s 33(3) of the GPA 'connotes an obligation to pay' (para 71 of the report), (vi) that s 33(3) provided that 'pending an appeal or otherwise' the government may apply for a stay or suspension of the payment' (para 71 of the report), (vii) that once a certificate was issued under s 33(1) of the GPA and duly served on the state government, it was obligatory on the state government to make the necessary payment (para 72 of the report), (viii) that pursuant to s 33(3) of the GPA the state government was under a statutory duty to pay the judgment sum as stated in the said certificate (para 81 of the report), (ix) that the said Minister who was in charge of financial matters for the state was responsible for the payment of the judgment sum (para 82 of the report), and, (x) that in the circumstances of the case an order of mandamus could be issued to the said Minister to enforce compliance by the said Minister (para 82 of the report).

[56] At para 92 of the judgment which had the full support of Abdul Hamid Mohamad CJ, Arifin Zakaria FCJ summed up the general position as follows:

> From the above, the position in law is that, there is a duty on the part of the government to pay the amount stated in the certificate issued under s 33(3) of the GPA to the respondent. It is not a matter of discretion for the government whether to pay or not to pay. As a statutory duty it is of course binding on the state government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of mandamus.

[57] Hence, the respondent could not levy execution of the judgment by way of the procedure contained in the RHC. The only procedure open to the respondent was that provided in s 33 of the GPA. Under s 44 of the SRA, the court below was seized to 'make an order requiring any specific act to be done 'by any person holding a public office'. Amongst the orders that the court below could make was the order of mandamus. All except that the court below could only make such an order against 'a person holding a public

office'. A person holding public office is a public officer lawfully holding, acting or exercising the functions of a public office in any of the public services as defined in art 132(1). However, as Chief Minister of the state, the appellant was a member of the administration as defined in art 160 of the Federal Constitution. The appellant was not 'a person holding a public office' within the meaning of 'public office' as defined in the Interpretation Acts 1948 and 1967 and read together with art 132(1) of the Federal Constitution, that definitely so as art 132(3) expressly provides that 'the public services shall not be taken to comprise the office of any member of the administration in the Federation or a State'. An order of mandamus could not be issued against the appellant under s 44 of the SRA. There were yet the additional powers under s 25 of the CJA. But in the instant case, the order of mandamus was issued, even though within powers, to the wrong entity. Under art 11(4) of the Laws of the Constitution of Pahang, 'the State Financial Officer shall, subject to the provisions of this Part, be the principal officer in charge of the financial affairs of the State'. Unlike the said Minister in *Petrojasa* who was in charge of financial matters for the state and who was responsible for the payment of the judgment sum (see *Petrojasa* at para 82), the appellant was not the principal officer in charge of the financial affairs of the State of Pahang. The appellant was not responsible for the payment of the judgment sum.

[58] To compound the error, the respondent had not complied with O 53 r 3(6) of the RHC, which read as follows:

> An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[59] '… an application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose'. Prior to its amendment in 2000 (see PU(A) 342/2000), the former O 53 provided that 'no application for an order for mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule' (former O 53 r 1(1)), and that 'leave shall not be granted to apply for an order of certiorari to remove any judgment, order, conviction, or other proceedings for the purpose of it being quashed, unless the application for leave is made within 6 weeks after the date of the proceeding or such other period (if any) as may be prescribed by any enactment, or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the Court or judge, to whom the application for leave is made and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Court or judge may adjourn

A the application for leave until the appeal is determined or the time for appealing has expired' (former O 53 r 1A). Under the former O 53, there was a prescribed time for an application to be made for leave to apply for an order of certiorari (see *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54 where it was held by the former Federal B Court per Abdoolcader FCJ that the terms of O 53 rr 1 and 1A clearly reflected the imperative requirements which must be complied with before an application for certiorari can be made). But the former O 53 r 1A only applied to an application for an order of certiorari. Under the former O 53, C it was not so provided that leave shall not be granted unless the application for leave to apply for an order of mandamus or prohibition was made within a prescribed time upon a certain date or event. But that dichotomy, different rules for different prerogative writs, if any (see *Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors* [1999] 2 MLJ 385 at p 395, where D it was held by Abdul Hamid Mohamed J, as he then was, that the reliefs sought, namely prohibition and mandamus, required leave to be obtained within six weeks from the date of the decision of the appeal board), has been done away with. Now, all applications for judicial review must be made 'promptly and in any event within 40 days from the date when grounds for E the application first arose or when the decision is first communicated to the applicant provided that the court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days'.

F **[60]** It is imperative that an application for judicial review is made within time (*Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773). Three recent authorities illustrate how those prescribed 40 days had been calculated. In *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695, it was held that the G material date from which the 40 days was to be calculated was the date when Bursa resisted attempts by GBA to preclude the listing committee from partaking in deliberations. In *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704, it was held that the application had to be made within 40 days from when the decision was H communicated to the applicant. And in *TR Lampoh Ak Dana & Ors v Government of Sarawak* [2005] 6 MLJ 371, it was in effect held that any application for judicial review had to be made within 40 days from the date of *Gazette* of the direction.

I **[61]** In the instant case, there was no dispute that the s 33(1) certificate was served on the State Legal Advisor of Pahang on 7 April 2008, that the letter of demand was dated/issued on 27 August 2008, and, that 'the application for judicial review was made on 15.10.2008'. Since there was an application for judicial review, there ought to have been grounds for the application. The

stated grounds in the affidavit (see 70 of the AR) filed in support of the said application, the relevant paragraphs, were as follows:

3. Pada 25.05.2007 Plaintif telah memperolehi penghakiman terhadap Kerajaan Negeri Pahang Darul Makmur dan Pengarah Perhutanan Negeri Pahang Darul Makmur dalam tindakan No. 21 – 9 – 2002 di Mahkamah yang Mulia ini. (Selepas ini dirujuk sebagai 'tindakan tersebut').

4. Melalui surat bertarikh 27.08.2007 peguamcara Plaintif telah menghantar sesalinan penghakiman tersebut kepada peguamcara Defendan-Defendan dalam tindakan tersebut dan meminta pembayaran amaun penghakiman dan faedah tetapi Defendan-Defendan tidak membuat sebarang bayaran. Salinan surat bertarikh 27.08.2007 dan Penghakiman bertarikh 25.05.2007 dikemukakan sekarang sebagai eksibit 'LS 1'.

5. Pada 07.03.2008 permohonan Plaintif untuk suatu Perakuan di bawah seksyen 33 Akta Prosiding Kerajaan 1956 telah dikeluarkan tanpa bantahan peguamcara Defendan-Defendan dalam tindakan tersebut. Salinan Perintah bertarikh 07.03.2008 dan salinan Perakuan Perintah untuk Amaun Penghakiman Terhadap Kerajaan juga bertarikh 07.03.2008 dikemukakan sebagai eksibit 'LS 2'.

6. Perintah dan Perakuan bertarikh 07.03.2008 telah diserahkan kepada peguamcara Defendan-Defendan dalam tindakan tersebut melalui surat bertarikh 07.04.2008 yang juga menuntut bayaran, tetapi Defendan-Defendan tersebut masih juga tidak membuat sebarang bayaran. Salinan surat bertarikh 07.04.2008 dikemukakan sebagai eksibit 'LS 3'.

7. Setakat ini di dalam tindakan tersebut tidak dapat apa-apa perintah yang menggantung atau menghalang pelaksanaan penghakiman dalam tindakan tersebut.

8. Juga Perakuan yang terdapat di eksibit 'LS 2' tidak menggantungkan pelaksanaan pembayaran amaun yang diperakui mengikut proviso kepada seksyen 33(3) Akta Prosiding Kerajaan 1956.

9. Saya dinasihatkan bahawa Perakuan yang dikeluarkan tanpa arahan penggantungan tersebut bererti Defendan-Defendan dalam tindakan tersebut semestinya membuat bayaran.

10. Menurut seksyen 33(3) Akta Prosiding Kerajaan 1956 adalah wajib bagi Kerajaan Negeri Pahang Darul Makmur, iaitu Defendan Pertama dalam tindakan tersebut, membuat bayaran amaun yang dinyatakan dalam Perakuan tersebut setelah Perakuan itu diserahkan.

11. Saya dinasihatkan dan percaya bahawa Responden yang dinamakan di atas selaku Menteri Besar Negeri Pahang Darul Makmur bertanggungjawab untuk membuat bayaran kepada Plaintif bagi pihak Kerajaan Negeri Pahang Darul Makmur iaitu Defendan Pertama dalam tindakan tersebut.

[62] The stated ground for the application for judicial review was failure on the part of the defendants to comply with the said s 33 certificate. If it were

in any way pertinent, in so far as the respondent were concerned, the State Government of Pahang had to pay the judgment sum upon service of the s 33 certificate, without any question of deferment (see 71–72 of the AR). Indeed, that was the undoubted case, for the duty to pay the judgment sum arose there and then, upon service of the s 33 certificate. Section 33(3) of the GPA was absolutely clear-cut that the respondent shall be paid the amount appearing by the certificate together with the interest, unless there was a direction that payment be suspended:

> If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:
>
> Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.

[63] Given that there was no direction that payment was suspended, the duty to pay arose upon service of the s 33 certificate, literally upon presentation thereof. On the facts, the grounds for the application first arose on 7 April 2008, when service of the s 33 certificate was not met with payment. Filed more than six months later on 15 October 2008 without any extension of the said 40 days, the application for judicial review was way out of time. There was a patent failure to comply with rules of court, and the order of mandamus should have been there and then refused.

[64] For those reasons, I would allow the appeal which was argued on 5 October 2009.

[65] Approved for release this 31 March 2010.

Appeal allowed with costs.

Reported by Kohila Nesan